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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/524,886	12/01/2005	Jacques Thilly	8121-82019-01	2976
24197 7590 09/15/2010 KLARQUIST SPARKMAN, LLP 121 SW SALMON STREET SUITE 1600 PORTLAND, OR 97204				
EXAMINER SMALLEY, JAMES N				
ART UNIT 3781		PAPER NUMBER		
NOTIFICATION DATE 09/15/2010		DELIVERY MODE ELECTRONIC		

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

Notice of the Office communication was sent electronically on above-indicated "Notification Date" to the following e-mail address(es):

tanya.harding@klarquist.com  
docketing@klarquist.com

**Advisory Action  
Before the Filing of an Appeal Brief**

<b>Application No.</b> 10/524,886	<b>Applicant(s)</b> THILLY ET AL.
<b>Examiner</b> JAMES N. SMALLEY	<b>Art Unit</b> 3781

**--The MAILING DATE of this communication appears on the cover sheet with the correspondence address --**

THE REPLY FILED 13 August 2010 FAILS TO PLACE THIS APPLICATION IN CONDITION FOR ALLOWANCE.

1. ☒ The reply was filed after a final rejection, but prior to or on the same day as filing a Notice of Appeal. To avoid abandonment of this application, applicant must timely file one of the following replies: (1) an amendment, affidavit, or other evidence, which places the application in condition for allowance; (2) a Notice of Appeal (with appeal fee) in compliance with 37 CFR 41.31; or (3) a Request for Continued Examination (RCE) in compliance with 37 CFR 1.114. The reply must be filed within one of the following time periods:

- a) ☒ The period for reply expires 3 months from the mailing date of the final rejection.  
 b) ☐ The period for reply expires on: (1) the mailing date of this Advisory Action, or (2) the date set forth in the final rejection, whichever is later. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of the final rejection.  
 Examiner Note: If box 1 is checked, check either box (a) or (b). ONLY CHECK BOX (b) WHEN THE FIRST REPLY WAS FILED WITHIN TWO MONTHS OF THE FINAL REJECTION. See MPEP 706.07(f).

Extensions of time may be obtained under 37 CFR 1.136(a). The date on which the petition under 37 CFR 1.136(a) and the appropriate extension fee have been filed is the date for purposes of determining the period of extension and the corresponding amount of the fee. The appropriate extension fee under 37 CFR 1.17(a) is calculated from: (1) the expiration date of the shortened statutory period for reply originally set in the final Office action; or (2) as set forth in (b) above, if checked. Any reply received by the Office later than three months after the mailing date of the final rejection, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**NOTICE OF APPEAL**

2. ☐ The Notice of Appeal was filed on \_\_\_\_\_. A brief in compliance with 37 CFR 41.37 must be filed within two months of the date of filing the Notice of Appeal (37 CFR 41.37(a)), or any extension thereof (37 CFR 41.37(e)), to avoid dismissal of the appeal. Since a Notice of Appeal has been filed, any reply must be filed within the time period set forth in 37 CFR 41.37(a).

**AMENDMENTS**

3. ☐ The proposed amendment(s) filed after a final rejection, but prior to the date of filing a brief, will not be entered because  
 (a) ☐ They raise new issues that would require further consideration and/or search (see NOTE below);  
 (b) ☐ They raise the issue of new matter (see NOTE below);  
 (c) ☐ They are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal; and/or  
 (d) ☐ They present additional claims without canceling a corresponding number of finally rejected claims.

NOTE: \_\_\_\_\_. (See 37 CFR 1.116 and 41.33(a)).

4. ☐ The amendments are not in compliance with 37 CFR 1.121. See attached Notice of Non-Compliant Amendment (PTOL-324).  
 5. ☒ Applicant's reply has overcome the following rejection(s): Claims 12-13.  
 6. ☐ Newly proposed or amended claim(s) \_\_\_\_\_ would be allowable if submitted in a separate, timely filed amendment canceling the non-allowable claim(s).  
 7. ☒ For purposes of appeal, the proposed amendment(s): a) ☐ will not be entered, or b) ☒ will be entered and an explanation of how the new or amended claims would be rejected is provided below or appended.  
 The status of the claim(s) is (or will be) as follows:  
 Claim(s) allowed: 12, 13 and 18-20  
 Claim(s) objected to: 2, 5-7 and 17  
 Claim(s) rejected: 1, 4 and 8-11  
 Claim(s) withdrawn from consideration: \_\_\_\_\_

**AFFIDAVIT OR OTHER EVIDENCE**

8. ☐ The affidavit or other evidence filed after a final action, but before or on the date of filing a Notice of Appeal will not be entered because applicant failed to provide a showing of good and sufficient reasons why the affidavit or other evidence is necessary and was not earlier presented. See 37 CFR 1.116(e).  
 9. ☐ The affidavit or other evidence filed after the date of filing a Notice of Appeal, but prior to the date of filing a brief, will not be entered because the affidavit or other evidence failed to overcome all rejections under appeal and/or appellant fails to provide a showing a good and sufficient reasons why it is necessary and was not earlier presented. See 37 CFR 41.33(d)(1).  
 10. ☐ The affidavit or other evidence is entered. An explanation of the status of the claims after entry is below or attached.

**REQUEST FOR RECONSIDERATION/OTHER**

11. ☒ The request for reconsideration has been considered but does NOT place the application in condition for allowance because:  
See Continuation Sheet.  
 12. ☐ Note the attached Information Disclosure Statement(s). (PTO/SB/08) Paper No(s). \_\_\_\_\_  
 13. ☐ Other: \_\_\_\_\_

/Anthony Stashick/  
Supervisory Patent Examiner, Art Unit 3781

Continuation of 11, does NOT place the application in condition for allowance because:

Regarding point A/ Claim 1: Applicant argues that the crimp connection of Jansen does not comprise "snap fit engagement parts" as claimed. Examiner asserts that the final product in Jansen is the same as the claimed invention, since both result in a plastic clamp part whose inner radius is less than the external radius of the bottle neck onto which they are connected. Moreover, Examiner notes that the claims only require "snap fit engagement parts" and do not claim more functional language drawn to the assembly, such as "...wherein the clamp part is snapped onto the vial neck...." Examiner asserts the final products are the same. Moreover, the crimped connection taught by Jansen could have been applied in a pre-formed state, and snapped onto the container, since it meets all structural features of the final assembled product. Compare Jansen Figure 2 to instant Figure 1, and note that both show a vial having a radial projection, underneath which sits a plastic part. Examiner asserts that the final products are essentially the same, noting that the differences (such as the flat faces in the instant invention) are not claimed, since they both result in a plastic, radially-inwardly directed flange located underneath a vial flange having a larger radius. This is essentially a product-by-process limitation. It has been held that method limitations in a product claim do not serve to patentably distinguish the claimed product from the prior art. See *In re Thorpe*, 777 F.2d 695, 227 USPQ 964 (Fed. Cir. 1985). Thus, even though a product-by-process claim is limited and defined by a process, determination of patentability is based on the product itself. Accordingly, if the product in a product-by-process claim is the same or obvious from a product of the prior art, the claim is unpatentable even though the prior art product was made by a different process. *Thorpe*, 777 F.2d at 697, 227 USPQ at 966; *In re Marosi*, 710 F.2d 799, 218 USPQ 289 (Fed. Cir. 1983).

Regarding point B/ Claim 4, cover part (44) teaches a skirt wall (94) to which the frangible link (98) is connected.

Regarding point C/ Claim 8, Examiner notes col. 5, lines 52-54, which teach the stopper could be formed of a "synthetic" elastomer, which Examiner asserts to be a thermoplastic, as is well-known in the art.

Regarding point D/ Claim 9, arguments are presented for claim 1 above.

Regarding point E/ Claim 10, Examiner notes Jansen Fig. 2, wherein a cover part upper wall (88) and lower part (96) are connected by a frangible link (98). It is not clear how this is not readily apparent from the figures.

Furthermore regarding claim 10, Examiner refers to arguments presented above to claim 1, regarding "snap fit engagement parts."

Regarding point F, Applicants arguments are again drawn to the snap fit, which has been addressed above.

Regarding claim 12/Prima Facie obviousness, Examiner notes the grounds of rejection have been withdrawn, and the claims are allowed.